IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-671

DELTA AIR LINES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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This Brief is submitted in reply to the Brief for the United States in Opposition pursuant to Supreme Court Rule 24(4).

This case does not invoke the question whether the District Court's factual findings and conclusions were "clearly erroneous". The issue presented is whether the Court of Appeals was correct in applying the "clearly erroneous" standard in reviewing the District Court's finding of no proximate causation[1] where: (1) the Court of Appeals had no way of knowing what, if any, standard of proximate

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[1] Without stating any legal standard, the District Court held: "[P]laintiffs have not proven by a preponderance of the evidence either that ATC personnel were negligent or that the conduct of ATC, however characterized, was a proximate cause of the crash either in whole or in part." Petition, p. 116a.

causation the District Court applied; and, (2), the Court of Appeals had already determined that the District Court's interrelated finding of no governmental negligence was clearly erroneous.

The Government's contention in Point 3 of its Brief is that the fact that the District Court did not employ or articulate legal standard for proximate causation is unimportant because "the district court found no causal connection between the alleged negligence of ATC personnel and the crash of D 723". Government's Brief, p. 8. Surely the Government is wrong when it contends that there is no need for a United States District Court to know what the law is before it renders a decision.[2] Yet it is clear that the District Court invoked no test for proximate cause in assessing the liability of the United States.

The Court of Appeals discussed one test for proximate cause, but did not apply it to this case because it treated the question of causation as a finding of fact entitled to the protection of the clearly erroneous rule. Yet the Court of Appeals could not review the District Court's finding of no proximate cause unless it could determine the legal standard for proximate cause applied by the District Court. This it did not do and, indeed, could not do.

The Government's conclusion that "[i]f the court of appeals had found some error of consequence, it would have said so" merely begs the question. The fact of the matter is that the District Court enunciated no standard for proximate cause and the Court of Appeals discussed, but did not apply, a proximate cause test, because it merely applied the "clearly erroneous" rule to the finding of no proximate cause.

[2] It may be assumed that one of the purposes of another section of F.R.C.P. 52(a) which requires separate findings of fact and conclusions of law is to force the District Court to resolve and decide cases by applying articulated legal principles.

The Government contends in its Point 2 that the District Court's finding of no proximate causation was separate and independent of the District Court's clearly erroneous finding of no governmental negligence. Such a contention is clearly without basis. Surely the Government does not believe that, having found no negligence, the District Court could have found that the air controller's conduct caused the accident. Significantly, the Government's brief is silent about the fact that the District Court relied upon the same witnesses for both its clearly erroneous finding of no governmental negligence, and its finding of no proximate causation.[3]

Lastly, the Government's contention in Point 2 ignores the indisputable taint the District Court's clearly erroneous finding of no negligence had on its consideration of the eleven cases cited by Petitioner. These cases, holding that similar governmental negligence caused or contributed to air crashes, were distinguished by the District Court, on the basis that, in those cases, governmental negligence was present. When governmental negligence was found in this case by the Court of Appeals, the District Court should have been given the opportunity of reconsidering these cases on the issue of proximate cause.[4]

The Government's argument then comes down to a bold assertion that nothing is wrong with the procedures of the courts below. Yet there can be no doubt that there was indeed something seriously wrong. For no court in this case has determined whether Petitioner has proven by a

[3] Incredibly, the Government cites these witnesses' testimony to support its position.

[4] This taint is discussed fully at pp. 15-19 of the Petition wherein the Court of Appeals' mistaken reliance on this section of the District Court's decision reveals that the Court of Appeals was so shackled by the "clearly erroneous" standard that it did not even review the District Court's handling of this nearly unanimous precedent.

preponderance of evidence that the negligence of the Government caused or contributed to the aircrash under the applicable legal standard for proximate causation. Petitioner invoked the aid of the judicial system of the United States to make just this determination and *it has not been made.* The District Court did not make it because it found no governmental negligence and did not apply any, let alone the applicable, legal standard of proximate cause. The Court of Appeals did not because, while it found governmental negligence and discussed a proximate cause test (still not the correct one), its application of the "clearly erroneous" standard precluded it from determining whether that negligence caused this accident on the basis of a preponderance of the evidence.

The Court, then, should determine whether the failure of the courts below to determine petitioner's claim is consonant with the Fifth Amendment to the United States Constitution's guarantee of due process of law. The Supreme Court of the United States is the ultimate arbiter of the federal judicial system. The issue presented in the Petition is an ultimate question of appellate procedure with a constitutional dimension. If the courts below failed to provide due process through their failure to articulate and apply correct legal standards or through incorrect application of standards of review, the Court has a duty to formulate new rules or to definitively interpret existing rules so that such failures cannot occur again.

If the Court determines that the Court of Appeals erred in applying "the clearly erroneous" standard to the District Court's finding of no proximate cause, the Court should also reach the conflict between the decision below and the Seventh Circuit in its decision of *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), cert. denied sub nom. *Forth Corp.* v. *Allegheny Airlines, Inc.*, 421 U.S. 978 (1975). The Government made a gross misstatement of fact in its footnote 4 where it says: "But petitioner never asked the district court to apply a federal rule of contribution and indemnity, and, accordingly, may not raise the matter now." The fact is that petitioner has urged the application of a federal rule of indemnity and contribution, as was adopted in *Kohr* by the Seventh Circuit, to the rights and liabilities arising out of the uniquely federal area of governmental control of the national airspace, at every stage of this proceeding. See, Post Trial Memorandum of Law of Delta Air Lines, Inc., January 26, 1976, p. 2 and Brief for Appellant Delta Air Lines, Inc., pps. 48-49. In light of the Court's decision in *Stencel Aero Engineering Corp.* v. *United States,* —— U.S. ——, 52 L.Ed.2d 665, 97 S.Ct. —— (1977), it seems clear that a federal rule of indemnity and contribution should be applied to this uniquely federal area.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case, as prayed in the Petition herein.

Respectfully submitted,

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February 9, 1978

Affidavit of Service

I, NATHANIEL F. KNAPPEN, being over the age of eighteen years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 9th day of February, 1978, served three copies of the foregoing Reply Brief of Petitioner upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with airmail postage prepaid, deposited in the United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ NATHANIEL F. KNAPPEN
Nathaniel F. Knappen

Sworn to before me this
9th day of February, 1978

/s/ MICHAEL J. HOLLAND
Notary Public
Michael J. Holland
Notary Public, State of New York
No. 41-4501283
Qualified in Queens County